Supreme Court, U.S.
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No. 98-569

In The

Supreme Court of the United States

October Term, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF TRI-CITE MANAGEMENT, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In New York City adult zoning is the United States Court of Appeals for the Second Circuit entitled to rely on 28 U.S.C. § 1738 to find collateral estoppel based on full and fair opportunity to be heard, place the burden on petitioners, and thus affirm the grant of summary judgment to respondents, and totally ignore New York Law which clearly places the burden on the respondents to show that unavailability of land was decided and decisive, particularly where in the federal court, petitioners did show such unavailability?

2. In a First Amendment case, is the New York State Court of Appeals' finding of no want of due process because of petitioners' failure to seek a hardship amortization extension when the enforcement was stayed and, as a corollary under ZR § 72-40, is it permissible in a First Amendment case to limit recoupment for amortization only to expenditures necessary for the adult use, such as adult videotapes, and ignore the remaining expenditures, such as walls, cement, plaster, boiler, air-conditioner, made in good faith at a time when an adult use is permissible?

LIST OF PARTIES AND RULE 29.6.

Neither the present amicus Tri-Cite Management, Inc. nor, to the best of our knowledge, any of the Amsterdam Video petitioners have any parents or subsidiaries. All parties are listed in Appendix A, the Second Circuit Opinion (1a-4a).

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BRIEF OF AMICUS CURIAE[1]

The brief of amicus Tri-Cite Management, Inc. (Tri-Cite) is submitted in support of petition of Amsterdam Video, Inc. (Amsterdam) to review the Opinion of the United States Court of Appeals for the Second Circuit entered June 3, 1998 in the Office of the Clerk of the Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (hereafter Second Circuit Opinion) is reported sub nom. *Hickerson v. City of New York*, at 146 F.3d 99 (CA 2, 1998) (1a-32a). It affirmed the judgment and order of the United States District Court, Southern District of New York, sub nom. *Hickerson v. City of New York*, 997 F.Supp. 418 (S.D.N.Y, 1998) (33a-47a). Both opinions held that the New York State Court of Appeals properly granted summary judgment to respondents under collateral estoppel full and fair opportunity to litigate the issues (7a, 20a n.6, 23a, 32a, 46a).

The New York State Court of Appeals' opinion grant of summary judgment for respondents is reported sub

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[1] All parties have consented to the filing of this amicus brief. No counsel for any party has authored this brief in whole or in part. Except for the caption and this footnote 1 and other very minor changes, this brief is identical to the October 9, 1998 timely served and filed petition under the abbreviated name of *Serendib, etc. v. The City of New York, et al.* Mr. Lorson returned all forty copies and the motion to file the Serendib petition on the theory one cannot have "two bites of the apple". Serendib has not had even one bite of the apple.

The entity who made a monetary contribution is Tri-Cite. This Brief raises issues *not* raised by the *Amsterdam* petitioners.

nom. *Stringfellow's of New York, Ltd. v. City of New York, et al.* at 91 N.Y.2d 382, 671 N.Y.S.2d 406 (1998) and reproduced at 48a-75a.

JURISDICTION

The opinion of the Second Circuit was entered June 3, 1998. A timely petition for rehearing by the Amsterdam petitioners was denied July 13, 1998. (76a) The jurisdiction of this Court to review the opinion of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are:

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT XIV, Section 1, Due Process and Equal Protection. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 provides in pertinent part:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

On October 25, 1995, the New York City Council gave final approval to N 950384 ZRY Amendment to the Zoning Resolution applicable to adult establishments. In February, 1996, the Amsterdam petitioners commenced an action in the New York State Supreme Court, alleging both a violation of the New York State Constitution Article I § 8, and the First Amendment to the United States Constitution. (55a-56a)

Respondents removed the case to the United States District Court for the Southern District of New York (hereafter District Court). On the Amsterdam petitioners' application, the District Court remanded to the State Court the " * * * plaintiffs causes of action under the [New York] State Constitution, * * * " retained jurisdiction over the federal claims. *Hickerson v. City of New York,* 932 F.Supp. 550 (S.D.N.Y. 1996). (56a, quote is from the Second Circuit) (and see 932 F.Supp. at 556; state constitution " * * * differs from the provisions of the federal constitution on which [the Amsterdam petitioners] rely".)

Thereafter, the Amsterdam petitioners advised the State Court of their intention under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) to litigate the federal court claims in the federal court. However, the New York State Court of Appeals held there was no difference between the United States Constitution First Amendment test under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and the New York Constitution Article I, Section 8 test, under *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989). (68a-70a)

Turning to the specifics of alternative avenues of communication, in *Stringfellow* the New York State Court of Appeals held the Amsterdam petitioners' expert's affidavit of Robert McLaughlin was insufficient as a matter of law to withstand the grant of summary judgment to respondents because:

> "The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to *quantify his observations* or to make concrete allegations as to precisely how many of the *500* potential receptor sites identified by defendants were, in his estimate, unavailable." (72a, emphasis supplied)

The New York State Court of Appeals then held:

> "Even if the criticized sites are eliminated, the absence of any *quantification* in the McLaughlin affidavit makes it impossible to determine whether what remains of the *500 identified* sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential

> zone along the far west side of Manhattan are physically or pragmatically unavailable, *his affidavit* does not contain the *hard factual data* necessary to establish that, with the elimination of these sites and with due consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses *represents a significant overestimation*. Given this shortfall, the accuracy of the City's own over-all calculations was not called into serious question." (72a, 73a, emphasis supplied)

Therefore, on the separate issue of alternative avenues of communication, in *Stringfellow* the New York State Court of Appeals granted summary judgment to respondents. (73a, 671 N.Y.S.2d at 419) Finally, the New York State Court of Appeals held that the one-year amortization in this First Amendment case was not too short because the Amsterdam petitioners did not apply to the Board of Standards and Appeals and, therefore, there was no due process violation. We digress to note that the enforcement had been stayed. (58a n.1)

The Circuit Court affirmed on the basis that collateral estoppel full and fair opportunity to litigate had been granted by the New York State Courts, and there were no differences between the New York State and Federal constitutions regarding adequate avenues of communication for adult uses. (7a, 9a, 14a-20a and n.6, 23a-24a, 32a) The Second Circuit first held:

> "We agree with the district court that the 'full faith and credit' statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and

fair opportunity to litigate these issues. Accordingly, we affirm." (7a)

The Second Circuit in amplification extensively quoted the New York State Court opinion and specifically opined that the Amsterdam petitioners had a full and fair opportunity to litigate because Mr. McLaughlin's affidavit, " * * * considered land to be 'unavailable' ", which *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 53-54, held was sufficient. (15a, 16a, 19a, 20a n.6, 23a)

In footnote 6, the Circuit Court plainly held that a "belated submission" by Mr. McLaughlin cannot overcome the Court's determination of collateral estoppel based on a full and fair opportunity to be heard. See also Circuit Court heading, *"Plaintiffs' Opportunity to Litigate the Issues in State Court,"* (23a). Neither the District Court nor the Circuit Court cited *D'Arata v. New York Central Mutual Fire Ins. Co.*, 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 26, 564 N.E.2d 634 (1990); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63 (1985) was quoted by the Second Circuit under the heading, *"Plaintiff's Opportunity to Litigate the Issues in State Court,"* to wit, that the Amsterdam petitioners " * * * as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity". (23a)

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the Second Circuit opinions' reliance on 28 U.S.C. § 1738, *Allen v. McCurry*, 449 U.S. 90, 96 (1980), *Migra v. Warren City*

School District Board of Education, 465 U.S. 75, 81 (1984) and the Second Circuit's holding of full and fair opportunity to be heard and the controlling opinion of the New York Court of Appeals, *D'Arata v. New York Central Mutual Fire Ins. Co.*, 76 N.Y.2d at 664, and *Haring v. Prosise*, 462 U.S. 306 (1983).

Under *D'Arata*, a New York State Court judgment is preclusive by way of collateral estoppel (1) where respondents bear the burden of proving the "identical issue" was necessarily decided and decisive, and (2) where petitioners bear the burden of proving they did not have a full and fair opportunity to litigate.

Haring unanimously held a guilty plea to the manufacture of a controlled substance did not bar by collateral estoppel a 42 U.S.C. § 1983 damage action for an alleged Fourth Amendment violation which was not " * * * actually litigated and determined" (id. at 315).

The Second Circuit held that:

> "Under the full faith and credit statute, 28 U.S.C. § 1738, 'Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *See also Migra v. Warren City Sch. Dist.Bd. of Educ.*, 465 U.S. 75, 84 (1984)". (8a)

However, one look at the Second Circuit Opinion makes it very obvious that the Court did not cite or consider (a) *D'Arata* or (b) its holding that the burden is on the *respondents* to show that the matter was actually litigated and decisive. All the Second Circuit held was

that Federal Law did not require the McLaughlin affidavit to "identify specific [relocation] sites". The Second Circuit otherwise ruled that the Amsterdam petitioners, based on a full and fair opportunity to be heard, were collaterally estopped from any trial showing that respondents had "significantly" overestimated the alternative avenues of communication. (20a and n.6, 21a)

Nonetheless, the Amsterdam petitioners by Mr. McLaughlin did *quantify* in the Federal Court. Assuming the figures set forth in the Second Circuit Opinion, footnote 6, are correct, the Amsterdam petition on the Second Circuit's own figures did show in the Federal Court, by concrete fact, that the respondents had made a "significant overestimation" of land space availability by approximately 82%. We have used space availability of 90. (90 out of 500, 90/500 = 18%) (20a and n.6)

Translated into a percentage of the total City acreage, instead of spaces available, it is approximately one 100th of 1% of the total New York City acreage, computed as follows: The 1996/1997 Green Book entitled, "The Official Directory of the City of New York", page 594, sets forth the total acreage in New York City as 205,952 acres. Assuming one (1) space equals one acre, or 43,560 square feet and bearing in mind that the adult Zoning Ordinance does not permit more than 10,000 square feet per adult establishment, or approximately one-fourth of an acre (43,560 square feet per acre), we have the following calculation. Ninety (90) acres divided by 205,952 acres equals .000438 and one-fourth of the .000438 is approximately one 100th of one percent.

This Court can take judicial notice of the Green Book and the adult Zoning Ordinance. Federal Rules of Evidence Rule 201(b)(f). 21 Wright and Graham, *Federal Practice and Procedure: Evidence*, § 5110, p. 521 et seq.

D'Arata first held:

> "As this doctrine has evolved, only two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action (See, *Kaufman v. Eli Lilly & Co.*, supra, at 455, 492 N.Y.S.2d 584, 482 N.E.2d 63). Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*see, id.*, at 455-456, 492 N.Y.S.2d 584, 482 N.E.2d 63). Collateral estoppel, we have held, is grounded on concepts of fairness and should not be rigidly or mechanically applied." (76 N.Y.2d at 664)

The New York Court of Appeals further defined "necessarily decided" and actually determined as follows:

> "Generally, for 'a question to have been actually litigated' so as to satisfy the identity requirement, it 'must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.' " (76 N.Y.2d at 667)

In *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 456, the New York State Court of Appeals, speaking of collateral

estoppel principle if necessarily decided as applied to concerted action, held:

> "Although both of these issues could have been raised by appropriate objection in the trial court, they were not, and *because they were not, we did not pass on them.*" (65 N.Y.2d at 456, emphasis supplied)

See also *Halyalkar v. Board of Regents of the State of New York*, 72 N.Y.2d 261, 267-269, 532 N.Y.S.2d 85, 88, 89, 527 N.E.2d 1222 (1988) guilty plea to charge wilfully and knowingly, no collateral estoppel because no identicality; wilful not actually litigated; Restatement * * * Of Judgments 2d § 28(4) collateral estoppel not applicable where different burden of proof.

In *Stringfellow*, the New York State Court of Appeals held that the McLaughlin affidavit's failure to quantify (this is the word of the New York Court of Appeals) did not raise an issue of fact sufficient to oppose the grant of summary judgment. It is impossible to conclude that the New York State Courts "necessarily decided" that any and all quantification by Mr. McLaughlin would fail to preclude summary judgment, or that when Mr. McLaughlin did quantify 90[2] available spaces instead of

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[2] In this petition, we assume the 90 space availability used by the Second Circuit, in its footnote 6, is correct. Even using 90, there is a significant over-estimation by respondents of 82% of land space available. Translated into percentages of land availability, and assuming the Second Circuit is correct, ninety spaces are, as stated, approximately one 100th of 1% of total land availability.

500, or approximately 82% unavailable spaces, the City gave a "significant overestimate on" available spaces precluding *all* opportunity to show otherwise.

The Second Circuit made it very plain that the failure to quantify (which McLaughlin subsequently did) was in the Federal Court insufficient because it was "belated" based on the Second Circuit " * * * agreement with the district court that the plaintiffs had a full and fair opportunity to present evidence * * * ". (20a n.6) In other words, the Second Circuit held there was issue preclusion based on the *burden* being on the Amsterdam *petitioners* to show lack of a full and fair opportunity to present quantification, instead of following New York law. One cannot under 28 U.S.C. § 1738 and *Migra*, 468 U.S. at 84, 85, totally ignore one-half of New York Law of collateral estoppel as the Second Circuit n.6 attempted to do.

The requirement that there be a Federal Court determination of whether there have been sufficient avenues of communication left open is further buttressed by a consideration of the following cases.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.35 (1976), the Court upheld the Zoning Ordinance only because there was no elimination of adult uses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 44, there was " * * * no [adult] use existing in the city at that time". In the present case, it is uncontested that there will be an elimination of 84% of the New York City's presently existing 177 adult uses. (70a)

In addition, there is vast confusion in the federal courts as to who has the burden of persuasion as to the availability of alternative avenues of communication.

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (CA 7, 1996) " * * * burden is on the government to justify the regulation", id. at 444. Does this mean only that the City must justify the substantiality of the governmental interest, i. e., blight, or does it refer to alternative avenues of communication? *Christy v. City of Ann Arbor*, 824 F.2d 489, 491 (CA 6, 1987) (burden on government to show purpose of eradicating urban blight); *Woodall v. City of El Paso*, 49 F.3d 1120, 1121 (CA 5, 1995) (burden apparently on plaintiffs); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (CA 9, 1993); *Phillips v. Borough of Keyport*, 107 F.3d 164, 175-178 (CA 3 en banc 1997).

Further, there is a well-settled rule that despite F.R.Civ.P. 52(a), where the First Amendment is at stake, the clearly erroneous rule does not apply and the Court is required to conduct its own investigation into the record. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 493, 503, 510 (1984); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S.___, 132 L.Ed.2d 487, 499, 500 (1995).

Lastly, as this Court stated in *Haring v. Prosise*, supra, even if the matter is precluded under State law, nonetheless, redetermination may be " * * * warranted if there is reason to doubt the quality, extensiveness or fairness of the procedures followed in the prior litigation". (462 U.S. at 317, 318) Just how a procedure can be deemed fair which relies on New York collateral estoppel law, but ignores one-half of that New York law and precludes virtually all adult entertainment establishments exercising First Amendment rights, with no opportunity to show that the facts accepted by the New York Court of Appeals

on summary judgment are not true, escapes us. See also Restatement * * * of Judgments 2d § 28(4) and (5).

2. In this First Amendment case, *Stringfellow* held there was no due process violation because petitioners had failed to seek a hardship amortization extension. (73a-74a) Apparently, the New York Court of Appeals forgot that all enforcement of the Amended Zoning Resolution was stayed. (6a n.2, 58a n.1) The stay seems to include the obvious stay of any requirement that there be an application for amortization.

Further, that the requirement that there be an application to the Board of Standards and Appeals under ZR 72-40 itself is violative of the First Amendment. For ZR 72-40 limits the "financial expenditures" to capital outlay, for "adult establishments". (78a-79a) *Acc'd Steam Heat, Inc. v. Silva*, 230 A.D.2d 800, 646 N.Y.S.2d 537, 540 (2d Dept. 1996) (" * * * only * * * expenditures directly related to the adult entertainment use * * * ").

In other words, all of the financial expenditures to install walls, cement, plaster, air conditioners, boiler, lighting made in good faith to establish an adult use, at a time when an adult use was permitted, are not directly related to adult use and, therefore, cannot be recouped. This is no amortization at all. It flies in the face of *Young v. American Mini Theatres, Inc.*, 427 U.S. at 71 n.35, and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 44, *754 Orange Ave., Inc. v. City of West Haven, Connecticut, et al.*, 761 F.2d 105, 113 (CA 2, 1985), quoting *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1224 (N.D.Ga. 1981), which held that "[m]ost adult zoning ordinances passed in the

wake of *Young v. American Mini Theatres, Inc.*, have contained grandfather clauses permitting pre-existing, nonconforming uses as to all regulated adult businesses." (761 F.2d at 113)

Stringfellow held there was no difference between the principles of the First Amendment as interpreted in *Renton* and those of Article I, § 8 of the New York Constitution as interpreted in *Town of Islip* and, in both, there must not be " * * * a substantial reduction in the total number of adult outlets * * * ". (68a-70a, quote is from 70a) With reference to amortization, it is very very clear that the New York State Court of Appeals did not in any way consider the controlling First Amendment federal court decisions. Under *D'Arata v. New York Central Mutual Fire Insurance Co.*, 76 N.Y.2d at 664, the issue of amortization under the First Amendment was very clearly *not* decided and *not* determinative.

CONCLUSION

The writ should be granted and the judgment of the United States Court of Appeals for the Second Circuit reversed, and the matter remanded with directions to reconsider in accord with the Opinion.

Dated: New York, New York

December 1, 1998

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 29, 1998) Decided: JUN 3 1998

Docket Nos. 98-7269, -7270

(Filed June 3, 1998)

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, and ELLIOT STAMLER

Plaintiffs-Appellants,

AMSTERDAM VIDEO INC., A & X ENTERTAINMENT INC., d/b/a Playpen II, ADULT VIDEO, INC., ASCOT SPACE AMUSEMENT, INC., d/b/a Ascot Theatre, BIG APPLE CINEMAS INC., d/b/a Show Follies Theater, BRETT DISTRIBUTORS, INC., d/b/a Media Distributors, CAPRI CINEMA INC., CAPWELL ENTERTAINMENT, INC., d/b/a Legz Diamond's Playhouse, CHURCH STREET CAFE INC., d/b/a Baby Doll Lounge, COLLEGE PT. REST. CORP., d/b/a Gallagher's II, CRAZY FANTASY VIDEO, INC., CUPID'S TREASURERS, INC., d/b/a Banana Video and Unicorn, DARA DISTRIBUTORS INC., d/b/a Love Shack, DESIRE VIDEO INC., E & A BOOKS, INC., E & A VIDEO AND MAGAZINE INC., ED-MART BAR & GRILL INC., d/b/a Penny Whistle, FOR THE PEOPLE THEATRES OF N.Y., INC., d/b/a Fair Theatre, FOUR KEYS ENTERPRISES, INC., d/b/a Hollywood Peepshows, FOURTEENTH ST. ENTERPRISES INC., d/b/a All Male Adult Video, FUN CITY VIDEO CORP., G & D MERCHANDISE CORP., d/b/a Peepland, GOTHAM EXHIBITOR INC., d/b/a Peep O Rama, HELEN WOLFF LTD., d/b/a Come Again, I.S. SULTARS INC., J & J TUMMY YUMMIES CORP., d/b/a Naked City, JGJ MERCHANDISE CORP., d/b/a Peepland/Valentina's II, JHM VIDEO CORP., JUM OPERATING CORP., d/b/a Peepland, JVR VIDEO CENTER INC., d/b/a Playground, KINEMATICS MERCHANDIZING & DISTRIBUTORS, INC., d/b/a

Kinematics, KISMA VIDEO, INC., L & T VIDEO, INC., d/b/a Badlands Adult Video, MADELINE D'ANTHONY ENT. INC., d/b/a Harmony Theatre, MANHATTAN VIDEO INC., MARQUIS VIDEO INC., d/b/a Marquis Video, MIRAGE PRODUCTIONS, INC., d/b/a Love Shack, MONTANA HOLDINGS INC., d/b/a Runway 69, NAWAN ENTERTAINMENT INC., d/b/a Euro World, NILUPUL VIDEO INC., N.R.S. VIDEO INC., NY VIDEO INC., d/b/a Love Shack, PABON THEATRE CORP., d/b/a Eros Theatre, PEREGRINE ENTERPRISES, INC., d/b/a Paradise Club, R.E.J.M., INC., d/b/a Big Top, RON BOB PUB INC., d/b/a Gallagher's, SAMI'S VIDEO WAREHOUSE, d/b/a Warehouse on the Block, LTD, SERENDIB VIDEO INC., d/b/a Serendib Video, SPH VIDEO CORP., STAR DISTRIBUTORS, LTD, STATEWIDE VIDEO INC., STEAM HEAT INC., STS VIDEO INC., d/b/a Adult Video, SUEMAR VIDEO, INC., d/b/a Goodtime Video, THIRD AVENUE ENTERTAINMENT INC., d/b/a XXX Video, THUNDER VIDEO INC., TOWN VIDEO SALES, INC., d/b/a Les Hommes Book Shop, VIDEO, VIDEO, VIDEO, INC., VIDEO 30 OF QUEENS INC., d/b/a Ecsxxxtasy Video, WEST VIDEO INC., ZIDEO VIDEO INC., 21 ANN STREET CORP., d/b/a Ann Street Adult Entertainment, 130 C STREET CORP., d/b/a Christopher Street Book Shop, 155 VIDEO CENTER CORP., d/b/a Peep-world, 300 BOOK CENTER, 303 W. 42ND STREET ENTERPRISES INC., d/b/a Show World, 323 CANAL ST., INC., 325 W. 45TH ST. REST. CORP., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8TH AVE. CORP., d/b/a Nude New York City, 45-08 VERNON BLVD. CORP., d/b/a Riverhead Inn, 603 VIDEO INC., 610 VIDEO STORE INC., 691 8TH AVENUE CORP., 691 VIDEO CENTER CORP., 693 VIDEO CORP., d/b/a TNL Video, 711 ASSOCIATES LTD., d/b/a Peepland, 729 6TH AVENUE CORP., d/b/a Billy's Topless, 733A CORP., d/b/a Video Palace, 763 VIDEO STORE INC., 777-779 8TH AVE. CORP., d/b/a Hollywood Twin, 81-22 BAXTER AVE. LOUNGE INC., d/b/a ILDA's Place II,

Plaintiffs-Appellants.

v.

THE CITY OF NEW YORK, HON. RUDOLPH W. GIULIANI, as Mayor of the City of New York, JOSEPH B. ROSE, as Director of City Planning, Department of City Planning of the City of New York, and GASTON SILVA, as Commissioner of Buildings, Department of Buildings of the City of New York,

Defendants-Appellees,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, BELLAIRE/BELL-VILL CIVIC ASSOCIATION, BNOS ISRAEL GIRLS' SCHOOL, BOWNE PARK CIVIC ASSOCIATION, BRIARWOOD COMMUNITY ASSOCIATION, BRONX COMMUNITY BOARD #12, BROOKLYN CIVIL COUNCIL, BROOKLYN TENANTS COUNCIL, CARDINAL SPELLMAN HIGH SCHOOL, COALITION OF UNITED RESIDENTS FOR A SAFER ENVIRONMENT, COLLEGE POINT BOARD OF TRADE, COMMITTEE FOR A BETTER AND SAFER NOSTRAND AVENUE, COMMUNITIES OF MASBETH AND ELMHURST TOGETHER, COMMUNITY SCHOOL DISTRICT 21 PRESIDENTS' COUNCIL, CONGREGATION BNAI SHLOIMA ZALMAN, CROWN HEIGHTS TAXPAYERS AND CIVIC ASSOCIATION, DOUGLASTON CIVIC ASSOCIATION, EAST MIDWOOD NEIGHBORHOOD ASSOCIATION, COUNCILMEMBER ANDREW ERISTOFF, GRAND CENTRAL PARTNERSHIP, HOLLISWOOD CIVIC ASSOCIATION, HUDDE JUNIOR HIGH SCHOOL PARENTS ASSOCIATION, JACKSON HEIGHTS COMMUNITY DEVELOPMENT CORPORATION, KINGS HIGHWAY DISTRICT MANAGEMENT ASSOCIATION, KINGSWAY JEWISH CENTER; LAWYERS' COMMITTEE ON VIOLENCE, MANHATTAN TERRACE CIVIC ASSOCIATION, COUNCILMEMBER HELEN MARSHALL, MIDWOOD CIVIC ACTION COUNCIL INC., NEW NORTHERN BOULEVARD BUSINESS ASSOCIATION, NORTHERN BOULEVARD MERCHANTS' ASSOCIATION, 100-299 EAST 77TH STREET BLOCK ASSOCIATION, PROSPECT PARK YESHIVA, QUEENS BRADDOCK CIVIC ASSOCIATION, QUEENS VILLAGE CIVIC ASSOCIATION, REAL ESTATE BOARD OF NEW YORK, RESIDENTS AGAINST STREET PROSTITUTION, ROSEDALE BLOCK ASSOCIATION, ROSEDALE CIVIC ASSOCIATION, COUNCILMEMBER JOHN SABINI, 34TH STREET PARTNERSHIP, UNITED CIVIC COUNCIL OF QUEENS, UNITED COMMUNITY CIVIC ASSOCIATION, COUNCILMEMBER

ANTHONY WEINER, WEST 45TH STREET BLOCK ASSOCIATION, WEST 47TH/WEST 48TH STREET BLOCK ASSOCIATION and WEST 90'S/WEST 100'S NEIGHBORHOOD COALITION,

Defendants-Respondents-Intervenors-Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying plaintiffs' motion for a temporary restraining order and preliminary injunction to stay the enforcement of an amendment to the Zoning Resolution of the City of New York that regulates the zoning of "adult establishment[s]." The district court concluded that plaintiffs were collaterally estopped from relitigating in federal court the same issues that were decided against them in the prior litigation of their state constitutional claims in state court.

Affirmed.

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York, NY (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; J. Michael Murray, Berkman, Gordon, Murray & DeVan, of counsel), *for Plaintiffs-Appellants Amsterdam Video, Inc., et al.*

BETH HAROULES, New York Civil Liberties Union Foundation, New York, NY (Arthur N. Eisenberg, Norman Siegel, New York Civil Liberties Union Foundation, of counsel), *for Plaintiffs-Appellants Rachel Hickerson, et al.*

LEONARD J. KOERNER, Office of the Corporation Counsel of the City of New York, New York,

NY (Michael D. Hess, Corporation Counsel of the City of New York, Gabriel Taussig, Elizabeth S. Natrella, of counsel), *for Defendants-Appellees.*

FREDERICK A.O. SCHWARZ, Jr., Cravath, Swaine & Moore, New York, NY, *for Defendant-Respondent-Intervenor-Appellee Times Square Business Improvement District*

WAYNE A. CROSS, Dewey Ballatine LLP, New York, NY, *for Defendants-Respondents-Intervenors-Appellees Center for the Community Interest, et al.*

JOSÉ A. CABRANES, *Circuit Judge:*

This case concerns an amendment to the Zoning Resolution of the City of New York (the "Zoning Amendment") regulating the zoning of "adult establishment[s]," as defined by the Zoning Amendment. The principal provisions of the Zoning Amendment limit the permissible locations of adult establishments to non-residential districts[1] and require that they be located – within the districts in which they are permitted – at least 500 feet away from any school, day care center, or house of worship; at least 500 feet from excluded districts; and at least 500 feet from one another. Plaintiffs in these consolidated cases are patrons and owners of adult establishments

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[1] Even prior to the passage of the Zoning Amendment, New York City's Zoning Resolution prohibited new commercial development in residentially zoned districts. Under the Zoning Amendment, adult establishments are also barred from certain districts that are zoned for commercial and manufacturing uses, but that permit new residential development as well.

within New York City who claim that the Zoning Amendment violates their rights to free expression under Article I, § 8 of the New York State Constitution and the First Amendment of the United States Constitution. In a case involving a different set of plaintiffs, we recently upheld the Zoning Amendment against facial federal constitutional challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Buzzetti v. City of New York*, ___ F.3d ___, 1998 WL 130866 (2d Cir. Mar. 20, 1998).

The factual background of the Zoning Amendment is detailed both in Buzzetti and in prior state and federal decisions arising from the instant litigation, with which we assume familiarity. *See Hickerson v. City of New York*, ___ F. Supp. ___, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998); *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996); *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y. Sup. Ct. 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, ___ N.Y.2d ___, 1998 WL 77749 (N.Y. Feb. 24, 1998). The instant appeal is from an order of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*), dated March 6, 1998, which denied plaintiffs' motion for a temporary restraining order and a preliminary injunction to stay the enforcement of the Zoning Amendment.[2] Although at the heart

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[2] During the prior state-court proceedings, the enforcement of the Zoning Amendment was stayed by court order. The stay was terminated by Judge Cedarbaum's March 6, 1998 order denying plaintiffs' application for a preliminary injunction. Judge Cedarbaum stayed her order until March 11, 1998, to allow plaintiffs to seek a stay in this Court. Judge Walker

of this litigation is a controversy over free expression, plaintiffs have already presented their free-speech claims to the New York courts. The only question before us is whether the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court. We agree with the district court that the "full faith and credit" statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and fair opportunity to litigate these issues. Accordingly, we affirm.

I.

We review the district court's denial of a preliminary injunction for an abuse of discretion. *See Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). "It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant." *Alliance Bond Fund, Inc. v. Grupo*

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extended the stay to March 11, 1998 so that the issue could be considered by a three-judge panel, and the panel ordered the appeal to be expedited and extended the stay through the hearing of the expedited appeal. At oral argument of this expedited appeal on April 29, 1998, we extended the stay until further order of this Court.

Mexicano de Desarrollo, S.A., ___ F.3d ___, 1998 WL 220954, at *9 (2d Cir. May 6, 1998). "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery*, 97 F.3d at 693. Because we conclude, however, that plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation."

Under the full faith and credit statute, 28 U.S.C. § 1738,[3] "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (noting that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims"); *see generally Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit

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[3] 28 U.S.C. § 1738 provides, in pertinent part, that state court determinations "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

between the same parties or their privies. . . . ' ") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) (ellipses in original)). New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., In re Sokol*, 113 F.3d 303, 306 (2d Cir. 1997); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984).

We agree with the district court that the issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the same that would be applicable to plaintiffs' First Amendment claim. Under both the federal and state Constitutions, the Zoning Amendment must: (1) be "content neutral," in the sense that it is aimed not at the restricted speech itself but at the negative secondary consequences that flow from it; (2) serve substantial government interests and be no broader than necessary to serve these interests; and (3) leave open reasonable alternative avenues of communication. *Compare City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986), *with Stringfellow's of New York, Ltd. v. City of New York*, ___ N.Y.2d ___, 1998 WL 77749, at *5 (N.Y. Feb. 24, 1998). The New York Court of Appeals unanimously held that the Zoning Amendment met these standards – just as this Court in *Buzzetti* found the Zoning Amendment constitutionally unobjectionable on the record then before us – and this determination is equally dispositive of plaintiffs' claim under the First Amendment. *Cf. Kremer v. Chemical Construction*

Corp., 456 U.S. 461, 479-80 (1982) (holding, in Title VII case, that "[a]lthough the claims presented to the NYHRD [New York State Division of Human Rights] and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." (footnotes omitted)).

Plaintiffs do not deny that the state and federal standards are nominally the same in all material respects, but rather argue that the standards are applied differently in state and federal court. In particular, plaintiffs contend that federal courts require greater proof from municipalities that the non-speech-related government interests at stake are substantial and that reasonable alternative avenues of communication remain available. We note that this contention is in stark contrast to plaintiffs' repeated assertions in earlier stages of this litigation that New York courts apply more favorable standards to their free-speech claims than federal courts. In any event, apart from their recent vintage, plaintiffs' arguments are mistaken.

A. Substantial Government Interests

With respect to the substantiality of New York's non-speech-related interests in the Zoning Amendment, the New York Court of Appeals observed that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, ___ N.Y.2d at ___, 1998 WL 77749, at *6. The court then reviewed in detail this legislative record, which included studies by the Times Square Business Improvement District, the Chelsea Action Coalition and Manhattan Community Board 4, and the Department of City Planning ("DCP"). Each of these studies linked the presence of adult establishments to increased crime and decreased property values. *See id.* at *6-7.[4] The court also noted that, apart from the City's own studies, the legislative record contained the conclusions of studies conducted by city councils and town boards throughout the country, which also showed a correlation between adult establishments and negative secondary effects such as

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[4] Although plaintiffs argue on appeal that the DCP's own study suggests no correlation between adult establishments and the negative secondary effects identified by the City, the New York Court of Appeals took account of, and rejected, this very argument, observing that "[a]lthough the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area." *Id.* at *7.

increased crime, depressed real estate markets, and an overall decline in the quality and character of surrounding neighborhoods. *See id.* Finally, the court rejected plaintiffs' complaints about the sufficiency of the evidence, holding that it was entirely appropriate to rely on studies from other jurisdictions – particularly in light of the fact that City officials had considered the comparability and reliability of these studies – and that the "non-empirical" nature of some of the City's evidence (*i.e.*, from surveys of businesses and real-estate brokers) did not render it valueless or insubstantial. *See id.* at *8.

Plaintiffs now raise the same objections to the City's evidence that were rejected by the New York Court of Appeals, and despite that court's thorough review and analysis of the legislative record, plaintiffs claim that federal law requires the City to provide greater evidence of negative secondary effects than the New York courts required. Accordingly, plaintiffs contend that they are not estopped from relitigating the sufficiency of the City's evidence under this allegedly more stringent federal standard. In arguing that a more stringent standard exists, plaintiffs rely almost exclusively on *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) (en banc), a case that provides no support whatsoever for their position. *Phillips* was an adult-use zoning case in which the Third Circuit required additional evidentiary support for a zoning ordinance that had been upheld by the district court "(1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative

effect of the ordinance." *Id.* at 173. The Third Circuit noted that, whereas in Renton the Supreme Court had considered the City of Renton's legislative record to be adequate where it consisted solely of studies from other cities that could reasonably be deemed relevant, "[h]ere, the district court had no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.' " *Id.* at 174. In order to avoid "reduc[ing] the First Amendment to a charade in this area," *id.* at 175, the Third Circuit required the Borough at least to "identify" the secondary effects with some particularity, and to "offer some record support for the existence of those effects," *id.* Far from suggesting that federal law would require more exacting scrutiny of the legislative record than was undertaken by the New York courts in this case, *Phillips* stands for nothing more than the unremarkable proposition that a barren legislative record will not suffice under the First Amendment – a proposition which is unhelpful to plaintiffs, in light of the fact that the legislative record in the present case is quite extensive, as the state courts recognized.

In any event, quite apart from the fact that we find no merit in plaintiffs' argument that the federal standard for judging the substantiality of New York's non-speech-related interests is stricter than the state standard, this Court, in *Buzzetti*, has already considered and rejected the argument that the legislative record is inadequate, as a matter of federal law, to support the City's legitimate and substantial interests in the Zoning Amendment. As we stated in *Buzzetti:*

> *Renton* emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in Renton itself, but rather were "entitled to rely on the experiences of . . . other cities." *Renton*, 475 U.S. at 51, 106 S.Ct. at 931; *see id.* at 51-52, 106 S. Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed. But . . . New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York.

___ F.3d at ___, 1998 WL 130866, at *7 (first ellipsis in original). Accordingly, it is clear that there is no basis for allowing plaintiffs to relitigate this issue in federal court.

B. Alternative Avenues of Communication

Plaintiffs' argument that federal courts apply a more stringent standard than the New York courts applied to determine whether there are "reasonable alternative avenues of communication" is also unavailing. Indeed, the New York Court of Appeals summarized the standard that federal courts have applied, and proceeded to apply that very standard as the basis for its inquiry under the

state Constitution. The court's discussion merits quotation at length:

> Relying on a formula derived from *City of Renton v. Playtime Theatres* . . . , the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53-54. Under Renton, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, City of Renton v. Playtime Theatres,* [475 U.S.] at 53, *Woodall v. City of El Paso,* 49 F.3d 1120, 1124-25 [(5th Cir.)], *cert*[.] *denied*[,] ___ U.S. ___, 116 S.Ct. 516 [(1995)]; *Grand Brittain, Inc. v. City of Amarillo, Tex.,* 27 F[.]3d 1068, 1070 [(5th Cir. 1994)]; *see also, Town of Islip v. Caviglia,* [73 N.Y.2d 544,] 555, 560 [(1989)] (areas of a municipality set aside for adult uses need not be prime locations)). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], *cert*[.] *denied*[,] 511 U.S. 1030 [(1994)]; *see also, Woodall v. City of El Paso, supra; Alexander v. City of Minneapolis,* 928 F.2d 278 [(8th. Cir. 1991)].)

> In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d at 1531). Notably, these considerations dovetail nicely with *Islip's* requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d at 555, 560). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Stringfellow's, ___ N.Y.2d at ___, 1998 WL 77749, at *9-10.

Significantly, the two cases most heavily relied upon by plaintiffs in arguing that federal law imposes more of an evidentiary burden on the City to prove the availability and suitability of alternative sites than the New York state courts imposed – *Topanga Press, Inc. v. City of Los Angeles and Woodall v. City of El Paso* – were cited and relied upon by the New York Court of Appeals. Forced to acknowledge this fact, which strongly suggests that the state court was not answering a different question or applying a standard less favorable to plaintiffs than federal courts would apply, plaintiffs argue that while "the New York Court of Appeals did refer to the *Topanga* and *Woodall* decisions [, a]nd . . . did suggest that the City was obligated to demonstrate 'the *physical* and *legal* availability of alternative sites. . . . and whether those sites are

part of the actual business real estate market[,]' . . . there is a serious analytic gap between this language . . . and the factual record developed in the state trial court." Brief of Hickerson Appellants at 31-32. Plaintiffs argue, in other words, that while the New York Court of Appeals purported to be making the same determination that a federal court would make under federal law to determine the availability of "reasonable alternative avenues of communication," plaintiffs should not be collaterally estopped from relitigating this issue because the "serious analytic gap" between the evidence and the recited standard belies any conclusion that federal standards were genuinely applied.

We find no such "serious analytic gap," nor any reason to doubt that the New York Court of Appeals answered the same question that would be dispositive under federal law. Plaintiffs' primary argument to the contrary is that federal law requires municipalities to identify the *specific* physically and legally available relocation sites. Plaintiffs have produced an affidavit from a land-use planning consultant, Robert McLaughlin (the "McLaughlin Affidavit" or "Affidavit"), which asserts that some of the land identified by the City as available for relocating adult establishments is not realistically available, for a variety of reasons – some of the land, for example, is allegedly occupied by "oil tank farms" and structures including "numerous and large facilities of the New York City Sanitation Department." McLaughlin Affidavit at 24, 26. Unless the City can precisely identify the "physically and legally available" sites to which the approximately 147 adult establishments that will need to relocate can move, plaintiffs argue, the City

has not carried its burden of proving that "reasonable alternative avenues of communication" exist under federal law.

Plaintiffs' argument suffers from several flaws. First, we are aware of no federal case, and plaintiffs direct our attention to none, that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are "physically and legally available" to accommodate the adult establishments. This is precisely the standard of proof to which the New York Court of Appeals held the City. Clearly then, to second-guess that court's determination of this issue would violate the full faith and credit statute.

After observing that "it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available," *Stringfellow's*, ___ N.Y.2d at ___, 1998 WL 77749, at *10, the New York Court of Appeals noted the City's evidence that, after excluding land identified by the City as being encumbered by properties unlikely to be developed for commercial use, 4% of the total land area of the City remained open to adult establishments. Maps prepared by the City reflected that, after factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available. *See id.* Further, the New York Court of Appeals considered the City's evidence that the zoning districts left open to adult establishments "permit a wide mix of commercial, retail, entertainment and manufacturing uses," *id.*, and that all of these areas in Manhattan and 80% of the areas in the other boroughs of New York are within a ten-

minute walk from a subway line or major bus route, *see id.*[5]

The court did not ignore plaintiffs' evidence – namely, the McLaughlin Affidavit – that portions of the 4% of "unencumbered" land identified by the City were not realistically available, but rather found this evidence insufficient to raise a material question of fact regarding the availability of "reasonable alternative avenues of communication." The court partially discredited the McLaughlin Affidavit because McLaughlin considered land to be "unavailable" that, under *Renton*, is not to be excluded – such as industrial areas, undeveloped land, and warehouse areas. *See Renton*, 475 U.S. at 53-54 (finding available land to be adequate where it included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space," and observing that the fact that the establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation"); *see also, e.g., Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d at 1069-70 (holding that adult-use zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land). The court also

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[5] The accessibility of potential sites in the so-called "outer boroughs" disposes of plaintiffs' argument – which, in any event, is without foundation and unsupported by case law – that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis.

recognized that while the McLaughlin Affidavit identified, within the 4% of purportedly "unencumbered" land identified by the City, specific sites that were clearly not realistically available, this was insufficient to cast doubt upon the availability of "reasonable alternative avenues of communication" where the City had produced evidence showing that this land could accommodate over 500 establishments under the terms of the Zoning Amendment, approximately *three times* the number of establishments that currently exist:

> The most significant flaw in McLaughlin's affidavit . . . is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable.[6] To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those

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[6] McLaughlin subsequently did quantify, in a new but substantially similar affidavit submitted to the district court, the number of sites he considered to be realistically available (90). However, in light of our agreement with the district court that plaintiffs had a full and fair opportunity to present evidence in state court, *see infra*, this belated submission does not affect our collateral estoppel inquiry. "A party . . . cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first." 18 James Wm. Moore, et al., Moore's Federal Practice § 132.02(2)(d), at 132-26 (3d ed.1998); *see, e.g., Yamaha Corp. v. United States*, 961 F.2d 245, 254-55, 257 (D.C.Cir.1992), cert. denied, 506 U.S. 1078 (1993).

> that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Stringfellow's, ___ N.Y.2d at ___, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 WL 77749, at *11; *see also Stringfellow's*, 171 Misc.2d at 396, 653 N.Y.S.2d at 814 ("Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing numbers of adult establishments. . . . [N]othing in *Renton*, *Islip* or any existing case law requires the City to identify specific sites that are actually available."); *cf. Woodall v. City of El Paso*, 49 F.3d at 1126 (stating, in response to complaints by adult establishments as to the viability of particular sites, that "even if we agreed that . . . these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable").

In sum, there is no reason to doubt that the New York Court of Appeals applied the same standard and answered the same questions that apply under federal

law in determining whether the Zoning Amendment provided for "reasonable alternative avenues of communication." The argument that federal law would have required the City to identify the precise sites to which adult establishments could relocate is not only unsupported by any federal case law, but is belied by our recent decision in *Buzzetti*. In *Buzzetti*, far from suggesting that the City's evidence was inadequate because it was not site-specific, we held that "there can be no doubt on this record that the Zoning Amendment allows for reasonable alternative avenues of communication." ___ F.3d at ___, 1998 WL 130866 at *8 (internal quotation marks omitted). Although we did not have the McLaughlin Affidavit before us in *Buzzetti*, the McLaughlin Affidavit is only relevant to whether plaintiffs have produced enough counter-evidence to cast doubt on the City's evidence, and it does not change the fact that under federal law the City was not required to identify precise relocation sites in order to prove the existence of "reasonable alternative avenues of communication." The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment – based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence – does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court.

C. *Plaintiffs' Opportunity to Litigate the Issues in State Court*

Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. *See In re Sokol*, 113 F.3d at 306; *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. *See In re Sokol*, 113 F.3d at 306; *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Under New York law, "[a] determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the [prior] litigation, including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827, 467 N.E.2d at 491 (internal quotation marks and citation omitted; alterations in original). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." *Id.* Substantially for the reasons stated by Judge Cedarbaum, we believe that plaintiffs have not met their burden of proving that they were denied a full and fair opportunity to litigate their claims in state court. *See Hickerson*, ___ F.Supp. at ___, 1998 WL 105583, at *5-6.

Accordingly, because the same issues decided by the state courts are dispositive of plaintiffs' claims under the First Amendment, and because plaintiffs had a full and fair opportunity to litigate these issues in state court, they are collaterally estopped from relitigating them in federal court.

II.

Plaintiffs argue that they are not precluded from litigating their First Amendment claim in federal court because they informed the state court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), that they intended to reserve the right to litigate their federal claims in federal court. *England* held that, after a federal court has abstained under the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), in order to obtain an authoritative interpretation of state law that could potentially moot or influence the federal constitutional questions presented, parties who have been remitted to state court against their will are not forced to litigate their federal claims there, but may reserve the right to a federal adjudication of these claims. *See* 375 U.S. at 421-22. The Supreme Court in *England* stated its "fundamental objections to any conclusion that *a litigant who has properly invoked the jurisdiction* of a Federal District Court to consider federal constitutional claims can be *compelled, without his consent and through no fault of his own,* to accept instead a state court's determination of those claims." *Id.* at 415 (emphasis added).

Consistent with *England's* focus on the problem of depriving a litigant who has "invoked" the jurisdiction of a federal court from being deprived of that choice "without his consent and through no fault of his own," the Supreme Court appeared to suggest in a subsequent case that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice. *See Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (characterizing *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (emphasis added)). A similar suggestion was made in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85 & n. 7 (1984). The question in *Migra* was whether litigants who could have, but did not, raise certain claims in their state case were precluded from raising those claims in a subsequent § 1983 suit in federal court. The Court held that such litigants were indeed so precluded, and relied heavily on the fact that such litigants voluntarily chose to proceed initially in state court. The petitioner in *Migra*, the Court observed, did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." *Id.* at 84-85. Having emphasized the voluntariness of the decision to file suit initially in state court, the Court then carefully noted that *England* provides a way for plaintiffs to return to federal court after a district court has abstained. *See id.* at 85 n. 7. By contrasting *England* with the situation in which a plaintiff has chosen to file suit in state court even though

he could have sought an adjudication of his federal constitutional claims in federal court, *Migra* can be read to suggest that *England* was not aimed at litigants who initially brought suit in state court. *Cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir.1992) ("The *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is *involuntarily* in state court." (emphasis added)).

In the instant case, plaintiffs did not invoke the jurisdiction of the federal court in the first instance, only to have the court invoke Pullman abstention. Instead, they filed suit in state court, which they believed would look upon their free-speech claims more favorably. Moreover, after defendants removed the case to federal court, plaintiffs moved to remand the case in its entirety (including their First Amendment claim) to state court, arguing that the case was not properly removable and also vigorously urging that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement." See Affirmation on Behalf of Amsterdam Video Plaintiffs, in Support of Motion to Remand, dated April 26, 1996 (United States District Court for the Southern District of New York, No. 96 Civ. 2204), in Joint Appendix at 227. The district court, in response to plaintiffs' motion, abstained under Pullman and remitted the state claims to state court, but denied plaintiffs' request to remand the federal constitutional claims and instead stayed these claims pending the outcome of the state litigation. *See* 932 F.Supp. at 551. Only then did plaintiffs file an *England* reservation.

Under these circumstances, plaintiffs cannot meaningfully be said to have been deprived of a federal forum

for their federal claims "without [their] consent and through no fault of [their] own." *England*, 375 U.S. at 415. If *defendants* had not sought to avail themselves of a federal forum after plaintiffs filed suit in state court, plaintiffs would have been held to their choice of forum and would have been required to submit their First Amendment claim to the New York state courts. The same would have been true if plaintiffs had been successful in moving to remand the entire case to state court. Alternatively, if plaintiffs' priority had been to obtain a federal forum for their First Amendment claim, they could have filed suit in federal court initially. *Cf. Migra*, 465 U.S. at 84-85 & n. 7. In light of *England's* emphasis on the need to preserve access to a federal forum *for those litigants who have chosen it*, and in light of the suggestive characterizations of *England* by the Supreme Court in the later cases of *Allen v. McCurry and Migra*, we agree with those courts that have held that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant plaintiffs who voluntarily chose to file suit in state court. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n. 5 (3d Cir.1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here."); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir.1988) (*England* "does not apply where the plaintiff voluntarily chooses to pursue a state action first."); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir.1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first

instance."); *cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1304-05 (considering itself bound by predecessor-circuit decision, *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976), allowing plaintiffs to file *England* reservation prior to bringing suit in federal court, but noting that "Jennings effectively abolishes the first requirement for an *England* reservation – filing in the first instance in federal court. Thus, it appears that the Jennings panel misread *England*, effectively rewriting the requirements for a valid *England* reservation."); *see generally* 17A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.").

We are not persuaded that a contrary result is required by footnote 13 of *England*, which contains some broad language seized upon by plaintiffs, but which we read simply to indicate that an *England* reservation is available not only to plaintiffs, but also to defendants who have removed the case to federal court, only to have the district court abstain. Footnote 13 states:

> The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in

> the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation.

England, 375 U.S. at 422 n. 13. Despite plaintiffs' reliance on the statement that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," we believe that it is clear, in context, that this footnote was only intended to clarify that *England* applies to defendants as well as plaintiffs, and that the particular language relied upon by plaintiffs was intended simply to clarify that a plaintiff may not, by fully litigating his federal claims in state court, deprive a defendant of his right to return to the federal forum. We do not read this language to render irrelevant a plaintiff's choice to avail himself of state, rather than federal, jurisdiction in the first instance, and we believe such a reading would contravene *England's* emphasis on preserving the federal forum for those who have "invoked" it but have been deprived of it "through no fault of [their] own." *Id.* at 415. Plaintiffs not only voluntarily filed suit in state court, but sought to remand the entire case to state court after it had been removed to federal court by defendants; while footnote 13 of *England*, under these circumstances, would have protected *defendants* from being deprived of their choice of a federal forum, it does not allow defendants' choice of a federal forum to be preserved by *plaintiffs*.

III.

Apart from their reliance on *England*, plaintiffs raise several other arguments as to why collateral estoppel does not apply, each of which is without merit. First, *citing Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), plaintiffs argue that because their federal claim arises under the First Amendment, they are entitled to an independent examination of the record. In First Amendment cases, notwithstanding the "clearly erroneous" standard of factual review set forth in Fed.R.Civ.P. 52(a), "we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." *Bery*, 97 F.3d at 693 (citing, *inter alia*, *Bose Corp.*, 466 U.S. at 499). However, this rule only concerns the proper level of *appellate* review, and does not bar the application of collateral estoppel. *See Ferris v. Cuevas*, 118 F.3d 122, 125 n. 3 (2d Cir.1997) (citing *Bose* requirement, but noting, pursuant to finding plaintiffs' First Amendment claims that were not raised in prior state-court proceedings to be barred by *res judicata*, that "[b]ecause our holding today is procedurally based and does not reach the merits . . . we do not conduct this higher level of factual review.").

Plaintiffs also rely on the doctrine that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159. They argue that such a change occurred when Mayor Rudolph W. Giuliani, one of the defendants in this action, stated at a press conference following the New York Court of Appeals' decision that the Zoning Amendment would "severely limit[ ]" the

places adult establishments could relocate to, and would "reduce the number in the city to something like 20 or 30." Text of Mayor Giuliani's City Hall Press Conference, February 24, 1998, in Joint Appendix at 914. *Montana* makes clear that the exception to collateral estoppel based on intervening changes in the factual record applies only when these changes "significant[ly]" affect the overall complexion of the record. *See* 440 U.S. at 157; 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(e), at 132-27 to 28 (3d ed.1998) (in order to render issue preclusion inapplicable, "a difference in pertinent facts" must be "sufficient to substantially change the issue"). Mayor Giuliani's statements to the press, particularly when compared to the extensive legislative record compiled by the City – whose conclusions actually differ from those stated at Mayor Giuliani's press conference – simply do not meet that standard.

A final point that, in plaintiffs' view, counsels against the application of collateral estoppel, is that Supreme Court review is unavailable with respect to the New York state courts' determination of a question of state law. This argument fails to appreciate that the district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court.

IV.

In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their First Amendment claim in federal court because the same issues that are dispositive of this claim have already been decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. Accordingly, plaintiffs can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation," and the district court's denial of plaintiffs' motion for a preliminary injunction was entirely proper. We have considered all of plaintiffs' other arguments, and find them to be without merit. The stay of Judge Cedarbaum's March 6, 1998 order is hereby vacated, the judgment of the district court is affirmed, and the Zoning Amendment may be enforced forthwith.

APPENDIX B

File Cop
U. S. DISTRICT COURT
FILED MAR. 9, 1998
S. D. OF N. Y.
- 80224

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

OPINION
96 Civ. 2203
(MGC)

AMSTERDAM VIDEO INC., et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

96 Civ. 2204
(MGC)

APPEARANCES:

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CEDARBAUM, J.

Plaintiffs in these two actions move for a temporary restraining order and preliminary injunction staying enforcement of Text Amendment N 950384 to the Zoning Resolution of the City of New York (the "Amended Zoning Resolution"), which regulates the zoning of "adult establishments."[1] The motion is denied for the reasons that follow.

In a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the issuance of a preliminary injunction requires the movant to demonstrate both irreparable harm and a likelihood of success on the merits. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995). This standard is particularly appropriate where a municipal regulation has been carefully examined by all of the courts of the state, including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights.

A violation of the First Amendment of the Constitution of the United States is itself irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Accordingly, when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm

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[1] Complete descriptions of the Amended Zoning Resolution can be found in this Court's prior opinion, *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996), and in *Stringfellow's of New York, Ltd. v. City of New York*, 653 N.Y.S.2d 801 (N.Y. County 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, ___ N.Y.S.2d ___, 1998 WL 77749 (N.Y. Ct. App. February 24, 1998).

merge into a single threshold requirement. Preliminary injunctive relief is not warranted in this case because plaintiffs have not shown likelihood of success on the merits.

BACKGROUND

Plaintiffs in the Hickerson action are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the Amended Zoning Resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. Plaintiffs in the Amsterdam action are owners and operators of business establishments which they allege are adult establishments as defined by the Amended Zoning Resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm.

Both groups of plaintiffs originally sued in the Supreme Court for New York County, asserting claims of violation of freedom of expression under the New York Constitution and the Constitution of the United States. Defendants, the City of New York and three city officials, removed the actions to this Court because of the federal questions presented by the complaints. Plaintiffs promptly sought to return to the state court by moving to remand the actions in their entirety. On June 27, 1996, plaintiffs' motions to remand were granted in part and denied in part. Under the doctrine of abstention of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), all of plaintiffs' state claims were remanded to New York

County Supreme Court, while the federal claims were stayed pending resolution of the state claims. *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996).

State Court Proceedings

After remand of the state constitutional claims, defendants moved for summary judgment on those claims. Before defendants filed their summary judgment motion, plaintiffs conducted some discovery, including a deposition of Marilyn Mammano, a staff person at the Department of City Planning.

In support of summary judgment, defendants submitted a number of affidavits and virtually the entire legislative record of the Amended Zoning Resolution, including various studies and reports on adult businesses, the records of public hearings related to the Amended Zoning Resolution, and maps purporting to show permissible locations for the operation of adult establishments under the law. In opposition to the defendants' motion, plaintiffs submitted numerous affidavits and legal memoranda, including an extensive affidavit from a land use expert, R. Bruce McLaughlin. McLaughlin's affidavit addressed the availability of alternative sites for the businesses required by the Amended Zoning Resolution to close or relocate. It appears from McLaughlin's affidavit that he had been studying the matter for many months. According to the affidavit, McLaughlin personally visited every one of the more than 500 sites identified by the defendants as available for adult establishments. Moreover, documents attached to the affidavit included an analysis prepared in August

1995, while the Amended Zoning Resolution was under consideration and approximately one year before defendants moved for summary judgment.

On October 23, 1996, Justice Marylin G. Diamond of the New York County Supreme Court granted defendants' motion for summary judgment on plaintiffs' state constitutional claims. *Stringfellow's of New York, Ltd. v. City of New York*, 653 N.Y.S.2d 801 (N.Y. County 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 671 N.Y.S.2d 406, 1998 WL 77749 (N.Y. Ct. App. February 24, 1998). Justice Diamond found that the Amended Zoning Resolution was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values. Justice Diamond found that, in enacting the Amended Zoning Resolution, the City reasonably relied on a number of studies undertaken in New York City and elsewhere concerning the secondary effects of adult establishments. She also found that the Amended Zoning Resolution is no broader than is necessary to address the negative effects associated with adult establishments.

Finally, Justice Diamond found that the Amended Zoning Resolution provides ample space for adult establishments, leaving almost 4% of New York City's total land area available for use by such establishments. She stated that defendants had "more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While Plaintiffs have labored mightily to create issues of fact, none

exist." *Id.* at 814. This conclusion was based in part on the specific analysis provided in the affidavit of William Bernstein, First Deputy Executive Director of the Department of City Planning, and other affidavits submitted by the defendants, who represented that approximately 500 potential relocation sites existed in New York City. She also considered McLaughlin's affidavit, which concluded that the actual number of available alternative sites was much smaller than the 500 or so claimed by the defendants. Justice Diamond found that McLaughlin's methodology was "fatally flawed" because it unjustifiably eliminated a number of sites based on factors that McLaughlin claimed make certain sites unavailable. *Id.* at 812. These factors included the undeveloped state of the proposed site, suitability for some "generic commercial enterprise," presence of a long-term lessee, current use as a parking lot and lease clauses prohibiting adult uses. Noting that such factors have been repeatedly rejected by state and federal courts, Justice Diamond found that McLaughlin and plaintiffs failed to rebut defendants' evidence that ample sites were available for the relocation of adult establishments. In so doing, she stated:

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Id. Justice Diamond rejected plaintiffs' contention that the defendants' estimate of 500 sites was invalid because it

was generated by computer and not by inspection of the actual sites. She determined from the deposition testimony of Marilyn Mammano that the defendants' computation of alternative sites was properly calculated, based on conservative measurements, and, while not "site specific," was an acceptable estimate of the potential number of sites in the permissible areas. *Id.* at 812-813.

Finally, Justice Diamond rejected plaintiffs' request for additional discovery, because the administrative record before the court was "thorough, extensive and comprehensive." *Id.* at 813.

The decision of the New York County Supreme Court was unanimously affirmed by both the Appellate Division, 663 N.Y.S.2d 812 (1st Dep't 1997), and the New York Court of Appeals, 1998 WL 77749 (February 24, 1998). Holding that the state constitutional standards governing regulations such as the Amended Zoning Resolution are substantially the same as the federal standards, the Court of Appeals relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication. Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants. ___ N.Y.S.2d at ___, 1998 WL 77749, at *12.

On February 26, 1998, plaintiffs returned to this Court seeking a temporary restraining order and a preliminary injunction against the enforcement of the Amended Zoning Resolution.

DISCUSSION

Defendants contend that the doctrine of collateral estoppel precludes plaintiffs from relitigating in this Court the same factual issues that have already been tried and decided in the state court. The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior action was tried. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Sokol v. New York*, 113 F.3d 303, 306 (2d Cir. 1997). Under New York law, a factual issue determined in a prior litigation is given preclusive effect if the issue to be precluded was necessarily decided in the prior litigation and the party opposing preclusion had a full and fair opportunity to litigate the issue. *Ryan v. New York Tel, Co.*, 478 N.Y.S.2d 823, 826 (N.Y. Ct. App. 1984); *Sokol*, 113 F.3d at 306. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Where factual determinations by a state court are at issue, collateral estoppel also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

The First Amendment standard applicable to a content-neutral zoning ordinance regulating the location of

adult entertainment businesses was established by the Supreme Court of the United States in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985). Under *Renton*, zoning ordinances of the kind at issue in these actions are content neutral time, place, and manner regulations if the legislative purpose is other than the restriction of speech. According to *Renton*, such a content-neutral ordinance is permissible if it is "designed to serve a substantial governmental interest" and "allows for reasonable alternative avenues of communication." *Id.* at 50.

Each of the inquiries set out by the Supreme Court in *Renton* – the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication – is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals. After extensive submissions by the parties, Justice Diamond held that (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Amended Zoning Resolution is "no broader than necessary" to prevent those adverse effects; and (4) defendants had "more than sufficiently demonstrated that the permissible areas" for adult establishments remaining in the City "are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate." 653 N.Y.S.2d at 803, 808, 809, 814.

Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion.

Plaintiffs offer no persuasive reason to be permitted to relitigate in this Court the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result. Plaintiffs contend that under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), they reserved their rights to relitigate these issues in federal court. The *England* case preserves a plaintiff's right to relitigate in federal court all issues related to the federal issues when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court because a federal judge sua sponte decides to abstain under *Pullman*. Here, however, plaintiffs' chosen forum was emphatically the state court. After plaintiffs filed these actions in state court, defendants removed them to this Court. Plaintiffs promptly moved to remand all their claims to the state court, and fought vigorously to return to their chosen forum, the state court. *England* does not govern or prohibit issue preclusion in these actions.

Plaintiffs also contend that they did not get a full and fair opportunity to litigate in state court. Under the New York law of issue preclusion, the party seeking preclusion has the burden of demonstrating the identity of the issues and that the issues were actually and necessarily decided in the prior litigation. The party opposing collateral

estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issues in the prior action. *Sokol*, 113 F.3d at 306. A determination of whether a full and fair opportunity to litigate was provided requires consideration of the "realities" of the prior litigation. The factors to be considered include: (1) the nature of the forum and the importance of the claim in the prior litigation; (2) the incentive to litigate and the actual extent of litigation; (3) the competence and experience of counsel; and (4) the foreseeability of future litigation. *Ryan*, 478 N.Y.S.2d at 827.

Plaintiffs complain that the actions were decided on summary judgment and after inadequate opportunity for discovery. Plaintiffs contend that their expert was not given adequate time to prepare his analysis of the purported alternative sites. Plaintiffs also argue that they were denied access to "critical information" such as how maps of permissible relocation areas were generated by the City. Finally, plaintiffs argue that they were not permitted to file a surreply after the City introduced new evidence and arguments on reply relating to the availability and suitability of potential sites.

The mere fact that a case is resolved on summary judgment and does not proceed to trial does not deny a party a full and fair opportunity to litigate. *See, e.g., Tobias v. First City National Bank and Trust Co.*, 709 F. Supp. 1266, 1270-1271 (S.D.N.Y. 1989). Moreover, the "full and fair opportunity" requirement does not entitle a party to unlimited discovery. Indeed, state court proceedings permitting no discovery at all can be entitled to preclusive effect in federal court. *McBride v. Bratton*, 1996 WL 636075, at *3 (S.D.N.Y. November 4, 1996), *aff'd*, 122 F.3d

1056 (2d Cir. 1997). It is undisputed that plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their extremely important effort to prevent New York City from requiring them to close and move their businesses. Plaintiffs were represented by experienced and highly competent counsel. They were permitted some discovery, and had a full opportunity to press any procedural grievances in addition to their substantive claims in the state courts.

Plaintiffs were permitted to take the deposition of Marilyn Mammano, designated by defendants as the staff person familiar with the calculation made by defendants with respect to available alternative sites. Plaintiffs complain that Ms. Mammano was repeatedly directed not to answer questions, including questions related to the methodology of calculating the number of alternative sites and the suitability of alternative sites. Plaintiffs also complain that their requests for documents on these topics – those reviewed by Ms. Mammano before the deposition, and other documents – were denied. On the other hand, plaintiffs themselves point to a great deal of information from the Mammano deposition that they used to support their position in the state court, including testimony relating to the degree of defendant's investigation of alternative sites.

The New York courts themselves addressed plaintiffs' demands for discovery. Justice Diamond noted that plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to defendants' motion for summary judgment, and that with those maps, he could have estimated the acreage size of

the permissible zones. Nevertheless, he failed to calculate the number of potential relocation sites under his methodology. She also expressly addressed plaintiffs' claim that additional discovery was needed, "in view of the present administrative record that this court finds to be thorough, extensive and comprehensive." 653 N.Y.S.2d at 813. Moreover, the New York Court of Appeals noted that before issuing a decision, the New York County Supreme Court ordered defendants to respond to interrogatories served by the Hickerson plaintiffs, to provide maps of alternative sites that eliminated encumbered areas, and to produce Ms. Mammano for deposition. The record before Justice Diamond totaled more than 10,000 pages, including pleadings, affidavits, exhibits and briefs. ___ N.Y.S.2d at ___, 1998 WL 77749, at *4.

In sum, plaintiffs have not shown that they did not have a full and fair opportunity to litigate ably and vigorously in the state courts the very factual issues that are dispositive of their claim under the First Amendment. Accordingly, the factual findings of the New York County Supreme Court as affirmed by the Appellate Division and the Court of Appeals are entitled to preclusive effect.

It should be noted that the zoning resolution attacked in this case under the First Amendment is before the Second Circuit in the case of *Buzzetti v. City of New York*, 1997 WL 164284 (S.D.N.Y. April 8, 1997). That case has been argued before the Second Circuit and is pending decision in that court.

This order denying a preliminary injunction is stayed until the close of court business on Monday, March 9,

1998 so that plaintiffs can promptly seek from the Second Circuit a stay pending appeal.

SO ORDERED.

Dated: New York, New York
March 6, 1998

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN
CEDARBAUM
United States District Judge

APPENDIX C

91 N.Y.2d 382

STRINGFELLOW'S OF NEW YORK, LTD., Appellant,

v.

CITY OF NEW YORK et al., Respondents,

Times Square Business Improvement District et al., Intervenors-Respondents.

AMSTERDAM VIDEO INC. et al., Appellants,

v.

CITY OF NEW YORK et al., Respondents,

and

Times Square Business Improvement District et al., Intervenors-Respondents.

Rachel HICKERSON et al., Appellants,

v.

CITY OF NEW YORK et al., Respondents,

and

Times Square Business Improvement District et al., Intervenors-Respondents.

Court of Appeals of New York.

Feb. 24, 1998.

Mark J. Alonso, P.C., New York City (Mark J. Alonso and Anna E. Bornstein, of counsel), for appellant in the first above-entitled action.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City (Herald Price Fahringer and Erica T.

Dubno, of counsel), for appellants in the second above-entitled action.

Arthur Eisenberg, Norman Siegel and Beth Haroules, New York City, for appellants in the third above-entitled action.

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City (Leonard Koerner, Albert G. Fredericks and Elizabeth S. Natrella, New York City, of counsel), for respondents in the first, second and third above-entitled actions.

Cravath, Swaine & Moore, New York City (Frederick A.O. Schwarz, Jr. and Justin J. Daniels, of counsel), for Times Square Business Improvement District, intervenor-respondent in the first, second and third above-entitled actions.

Dewey Ballantine, L.L.P., New York City (Wayne A. Cross and Heather K. McDevitt, of counsel), Dennis J. Saffran and Brian M. Stettin, for Center for the Community Interest and others, intervenors-respondents in the first, second and third above-entitled actions.

Morrison & Foerster, L.L.P., New York City (Michelle N. Kim, of counsel), for Association of the Bar of the City of New York, amicus curiae in the first, second and third above-entitled actions.

Zane and Rudofsky, New York City (Edward S. Rudofsky, Martin P. Mehler, Charles F. Axelrod and Arlene H. Schechter, of counsel), for Council of Regulated Adult Liquor Licensees, amicus curiae in the second above-entitled action.

Berkman, Gordon, Murray & De Van, Cleveland, OH (J. Michael Murray, of the Ohio Bar, admitted pro hac vice, of counsel), for First Amendment Lawyers Association, amicus curiae in the second and third above-entitled actions.

OPINION OF THE COURT

TITONE, Judge.

This appeal concerns the validity of New York City's Amended Zoning Resolution governing the location of adult entertainment establishments throughout the five boroughs. We conclude that on this record the Supreme Court correctly granted summary judgment declaring that the challenged ordinance does not violate plaintiffs' constitutional rights of free expression.

I. Factual Background

The "adult" establishments at the center of this controversy offer various forms of sexual expression. These businesses include bookstores, theaters, stores dealing in videotaped material and places of live entertainment. In 1965, there were only nine such establishments in New York City. That figure has fluctuated over the past 30 years, but the last decade has experienced a steady growth in the industry, with sections of Manhattan and Queens showing the greatest development. By 1993, there were 177 adult establishments operating in New York City: 107 in Manhattan, 44 in Queens, 15 in Brooklyn, eight in the Bronx and three in Staten Island.

In September of 1993, the Department of City Planning (DCP) undertook an evaluation of the impact of such property uses on urban life. Published in September 1994, the DCP study was divided into two parts. First, the DCP examined similar studies conducted in nine other localities: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. The DCP found evidence in these reports that adult businesses often have such negative secondary impacts as increased crime rates, depreciated property values and deteriorated community character.

The DCP also sought to identify the specific adverse secondary effects caused by adult establishments in New York City itself. To accomplish that goal, the DCP both conducted its own independent analysis of six selected areas in the City and examined other earlier studies of the City's adult uses. Among the other materials examined were a 1977 report by the City Planning Commission (CPC); a 1983 Annual Report of the Mayor's Office of Midtown Enforcement; a 1993 study conducted by the Chelsea Action Coalition and Manhattan Community Board 4; testimony at an October 1993 public hearing before the Task Force on the Regulation of Sex-Related Businesses; an April 1994 Times Square Business Improvement District (TSBID) study; and a 1993 survey compiling media accounts and complaint correspondence to City agencies.

The DCP's independent study confirmed that the number of adult establishments in the City had increased considerably in recent years. The DCP further found that

as adult uses proliferated, they tended to cluster. In Manhattan, for example, adult businesses were concentrated in central locations such as the Times Square area. In the other boroughs, such businesses lined major vehicular routes such as Queens Boulevard in Queens and Third Avenue in Brooklyn. Additionally, the vast majority of adult establishments were located in zoning districts that permitted residential development.

Based on the material before it, the DCP determined that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity.

II. The Challenged Ordinance

The Zoning Resolution of the City of New York, adopted on December 15, 1960, regulates commercial establishments in the City. Historically, the Resolution did not distinguish between adult establishments and other commercial ventures. Like other businesses, adult enterprises simply had to satisfy the requirements for the particular "use group" into which they were classified. Consequently, adult uses were permitted in most of the

City's commercial and manufacturing districts, which frequently also allowed residential development or were mapped close to residential districts.

Prompted by the findings and final recommendation of the DCP study that adult establishments should be regulated differently from other commercial establishments because of their unique negative effects, the CPC directed the DCP in November of 1994 to draft a set of adult-use zoning restrictions. Concomitantly, the City Council imposed a one-year moratorium on the creation or enlargement of adult-use establishments.

On March 21, 1995, the DCP and the City Council Land Use Committee jointly sought to amend the Zoning Resolution and establish a permanent and comprehensive set of regulations governing adult uses. Over the next several months, the City's 59 community boards, five borough boards and borough presidents, the CPC and the City Council reviewed the proposed amendments and conducted public hearings. On September 18, 1995, the CPC approved the proposed amendments, noting that they were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" and that they nonetheless continue "to provide ample opportunity for adult establishments to locate and operate throughout New York City." After further public hearings and debate, the City Council gave final approval to Text Amendment N 950384 ZRY on October 25, 1995.

As adopted by the City Council, the amendments are applicable to any "adult establishment," defined as those commercial enterprises in which a "substantial portion" of the premises are used as an "adult book store," an

"adult eating or drinking establishment," an "adult theater" or "other adult commercial establishment" (Amended Zoning Resolution § 12-10). Covered facilities are those within the foregoing four categories that "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities" (*id.*). "Adult eating or drinking establishments," "adult theaters" and "other adult commercial establishments" are covered only if they exclude minors because of their age (*id.*).

The amendments to the zoning code include an array of site limitations and anticlustering provisions. Under provisions that predate the amendments, new commercial establishments, including new adult establishments, are barred from the City's residential zones. Under the amendments, adult establishments, new and old, are now also barred from certain districts that are zoned for manufacturing and commercial use but also permit residential development. The regulated uses are permitted in all other manufacturing districts and in all high-density, general commercial districts (Amended Zoning Resolution § 32-01[a]; § 42-01[a]).

Within those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). In addition, no more than one adult establishment may be located on a single zoning lot, and these establishments cannot exceed 10,000 square

feet of usable floor area and cellar space (Amended Zoning Resolution § 32-01[d], [e]; § 42-01[d], [e]). The amendments also impose restraints on the size, placement and illumination of accessory business signs (Amended Zoning Resolution §§ 32-69, 42-55).

Any adult establishment operating in a prohibited location must either conform or terminate its business within one year of the amendments' effective date (Amended Zoning Resolution §§ 52-77, 52-734). An exception to this termination requirement is available for existing businesses which are noncompliant only because (1) their area exceeds 10,000 square feet, (2) they are located on a zoning lot with another adult use, or (3) they are situated less than 500 feet from another adult establishment (Amended Zoning Resolution § 32-01[f]; § 42-01[f]). Another narrow exception is made for otherwise conforming adult uses that fall out of compliance because of the subsequent siting of a school or house of worship within 500 feet of their boundaries (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). Lastly, adult establishments faced with the one-year termination deadline can apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment (Amended Zoning Resolution § 72-40).

III. Procedural History

On February 27, 1996, the *Amsterdam Video* plaintiffs, consisting of more than 100 owners and operators of

adult establishments in the City, and the *Hickerson* plaintiffs, consisting of four patrons of such establishments, commenced actions in Supreme Court, New York County, against the City and related officials. Plaintiffs alleged that the Amended Zoning Resolution deprived them of their right to free expression protected by article I, § 8 of the New York State Constitution and the First Amendment to the United States Constitution. Plaintiffs sought relief in the form of a judgment declaring the zoning amendments unconstitutional and enjoining their enforcement.

Defendants removed the case to the United States District Court for the Southern District of New York, but on plaintiffs' application the court remanded plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims (932 F.Supp. 550). Subsequently, Stringfellow's, a cabaret featuring topless dancers, separately challenged the constitutionality of the amendments and sought injunctive relief. Supreme Court then granted the intervention motions of TSBID, the Center for Community Interest, and 45 other community groups, business organizations and local elected officials and consolidated the actions for hearing.

On August 26, 1996, defendants moved for summary judgment. The *Amsterdam Video* and *Stringfellow's* plaintiffs cross-moved for summary judgment; the *Hickerson* plaintiffs opposed defendants' motions but declined to cross-move for summary judgment on the theory that the case involved material factual disputes warranting a trial. Before issuing its decision, Supreme Court ordered additional discovery, in particular directing defendants to answer interrogatories served by the *Hickerson* plaintiffs,

to provide maps to demonstrate the areas where adult uses would be permitted when encumbered areas were eliminated, and to produce for a deposition a person familiar with the DCP's calculation of the total number of alternative sites that would be available to relocated adult establishments under the amendments. A voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages was before the court on the various summary judgment motions.

On October 23, 1996, Supreme Court granted defendants' motions for summary judgment and declared that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution, and is, therefore, constitutional" (171 Misc.2d 376, 397, 653 N.Y.S.2d 801). Applying the test articulated by this Court in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 558-559, 542 N.Y.S.2d 139, 540 N.E.2d 215, Supreme Court first concluded that the amendments were content neutral. The court found in the City's planning studies sufficient evidence of adverse secondary effects to support use of its zoning authority to address a serious neighborhood problem. Additionally, the court held that the amendments were no broader than necessary to achieve their stated purpose, with zoning being the most appropriate response to address existing and anticipated future problems. Further, in the court's view, defendants had sufficiently demonstrated that the number of potential relocation sites under the Amended Zoning Resolution was more than adequate to accommodate the existing number of businesses. Plaintiffs' claim of a lack of available alternative sites, in contrast, was speculative and rested on discredited theories. Thus, the

court concluded, no issues of material fact existed requiring a trial. The Appellate Division unanimously affirmed (241 A.D.2d 360, 663 N.Y.S.2d 812) and plaintiffs took an appeal as of right pursuant to CPLR 5601(b)(1).[1]

IV. Analysis

This Court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives (*see, e.g., Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42). Because they are legislative enactments, these land-use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the State's police power to advance the public health, safety and welfare (*see, McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548-549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; *Udell v. Haas*, 21 N.Y.2d 463, 469-470, 288 N.Y.S.2d 888, 235 N.E.2d 897). Thus, even if the validity of a provision is "fairly debatable," the municipality's judgment as to its necessity must control (*Matter of Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 306 N.E.2d 155).

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[1] Enforcement of the Amended Zoning Resolution was stayed pursuant to an Appellate Division order dated October 24, 1996 and a subsequent agreement among the parties. On September 23, 1997, this Court denied defendants' request for a vacatur of the stay (90 N.Y.2d 933, 664 N.Y.S.2d 266, 686 N.E.2d 1362).

Municipal zoning authority is not, however, completely unfettered. Ordinances such as the one challenged here that aim to curb "adult" uses implicate speech or conduct that is protected by the First Amendment (*see, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180-2181, 68 L.Ed.2d 671; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098) and by article I, § 8 of the New York State Constitution.[2] Consequently, in weighing the validity of such zoning regulations, courts must consider the intertwined constitutional values of free expression.

In this State, the proper balance between community needs and free expression under our Constitution has been delineated in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, *supra*. At issue in Islip was a zoning ordinance that confined adult uses to industrially zoned areas and prohibited them from locating within 500 feet of a number of certain sensitive receptors or within one-half mile of each other. The ordinance had been prompted by studies of conditions locally and elsewhere which demonstrated the harmful impact of adult businesses on the surrounding community. We concluded that the ordinance satisfied both Federal constitutional standards (*see, Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29)

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[2] Article I, § 8 provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

and the distinct protections afforded by our State Constitution. In so ruling, the Court considered whether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town (73 N.Y.2d, at 552-555, 542 N.Y.S.2d 139, 540 N.E.2d 215, citing *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *supra; Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). With respect to the State constitutional claims in *Islip*, the Court considered whether the Town's ordinance was "justified by concerns unrelated to speech," whether it was " 'no broader than needed to achieve its purpose' " under the State constitutional principles set forth in *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, and, finally, whether "if the ordinance [were] enforced the total number of adult bookstores w[ould] decline or * * * fewer potential customers w[ould] be able to conveniently patronize them" (73 N.Y.2d, at 557-560, 542 N.Y.S.2d 139, 540 N.E.2d 215). It is against the template of *Islip*, that we measure plaintiffs' claims in these cases.

A. The Ordinance's Purpose Is Unrelated to Speech

The threshold issue here is whether the City's zoning amendments are purposefully directed at controlling the

content of the message conveyed through adult businesses or are instead aimed at an entirely separate societal goal. The Federal constitutional analysis requires examination of the ordinance's "predominant purpose" (*see, Renton v. Playtime Theatres, supra*), while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech" (*Matter of Town of Islip v. Caviglia, supra,* at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). In the context of these facts, however, the difference in verbiage does not significantly affect the outcome, since it is apparent from the amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's *only* goal.

Before enacting the Resolution, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. One of these studies, prepared by the TSBID, focused on the impact of adult uses on property values and the incidence of crime in the Times Square area, in the heart of Manhattan. The TSBID identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises.

The study concluded that "the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block." It also determined that "[w]ithin the study blocks, non-adult businesses with adult establishments nearby showed a deflated rate of property value growth, compared to the adult establishments themselves which increased in value at a higher rate." Similarly, the underlying data showed a correlation between a concentration of adult establishments and increased crime. Over the five years preceding the study, for example, police statistics showed that there was an estimated 54% decrease in crime in the Times Square area, a decrease which was paralleled by a decrease in adult establishments. The study also found significant "patterns," notably that there were many more criminal complaints on the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

The Chelsea Action Coalition and Manhattan Community Board 4 prepared a second study of the effects that sex-related businesses have on other businesses in the Chelsea section of Manhattan. The study incorporated a survey of 100 Chelsea businesses located near triple-X video stores and peep shows in the neighborhood. A majority of those surveyed indicated that adult uses had a negative impact on their businesses and on the economic viability of the community as a whole.

The DCP independently surveyed six study and control areas – two in Manhattan, and one in each of the remaining boroughs. More than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet; similarly, community organizations overwhelmingly reported their perceptions that adult businesses negatively affect the community. Although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area.

Finally, the City additionally reviewed conclusions reached by city councils and town boards throughout the country. A 1984 study conducted for the City of Indianapolis, for example, found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinions, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a one block radius of the store. Still another example was a 1997 Los Angeles study that included a survey of real estate professionals and businesses. The survey indicated that a concentration of adult establishments adversely affected the value of surrounding commercial and residential property, made

it more difficult to rent office space and retain commercial tenants in the area, and made it harder for area businesses to attract and retain customers.

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose (*see, Matter of Town of Islip v. Caviglia, supra*). Plaintiffs' reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression is unavailing. A similar claim was rejected in *Islip*, where we recognized that courts will not "invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression * * * . [I]t is the motive of the Legislature, not individual legislators, that is controlling" (*id.*, at 552, n. 2, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (*cf., Matter of Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). The test under both *Islip* and *Renton* is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (73 N.Y.2d, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215, 475 U.S. at 44, 47-50, 106 S.Ct. at 927, 928-930; *see also, Young v. American Mini*

Theatres, supra, at 52-54, 70-71, 96 S.Ct. at 2443-2445, 2452-2453 [plurality opn]). That test is plainly met here.

Plaintiffs' complaints about the sufficiency of the evidence on which the City Council based its decision are unpersuasive. In *Islip,* we explicitly acknowledged the value of studies from other jurisdictions (73 N.Y.2d, at 550, 553, 542 N.Y.S.2d 139, 540 N.E.2d 215). Further, it is clear from the comments of the CPC upon its approval of the amendments that the appropriate municipal officials considered the comparability and the reliability of the other jurisdictions' studies and found them satisfactory on both counts. As the CPC noted, "while none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, * * * the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City." Plaintiffs have not offered any factual or legal basis to question that finding.

Moreover, the City did not rely exclusively on generic conclusions drawn from out-of-area studies but also conducted studies of its own. Contrary to plaintiffs' contentions, the "nonempirical," anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (*see, e.g., Renton v. Playtime Theatres,* 475 U.S., at 44, 106 S.Ct. at 927, *supra; ILQ Invs. v. City of Rochester,* 25 F.3d 1413, 1416-1417 [8th Cir.], *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d

493), particularly where, as here, the nonempirical information is extensive and indicative of a clear relationship between adult uses and urban decay.

B. The Amendments Are No Broader Than Necessary

Based upon an extensive analysis of the impacts of such establishments in the City, the amendments represent a coherent regulatory scheme designed to attack the problems associated with adult establishments. By preventing adult businesses from locating in potential residential districts while allowing such establishments to locate in manufacturing and commercial districts, the amendments protect only those communities and community institutions that are most vulnerable to their adverse impacts.

It is now well recognized that municipalities can constitutionally bar adult establishments from, or within, a specified distance of residentially zoned areas and facilities in which families and children congregate (*see, Renton v. Playtime Theatres, supra,* at 44, 106 S.Ct. at 927; *Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 549, 563, 542 N.Y.S.2d 139, 540 N.E.2d 215). Moreover, zoning ordinances may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with the clustering (*see, Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 563, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on our State constitutional standard (*see, People ex rel. Arcara v. Cloud Books, supra,* at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492), plaintiffs insist that defendants should have pursued less restrictive methods of addressing the problems caused by adult uses, such as more aggressive enforcement of existing penal and public nuisance laws, developing targeted signage requirements and limiting adult-use zoning restrictions to new establishments. However, the record here shows that the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.

According to its report approving the proposed amendments, the CPC concluded that restricting only new adult uses "would have the effect of freezing certain locations and certain neighborhoods as the situs of adult establishments," making the reversal of existing adult-use-related blight impossible. The CPC also looked at the possibility of sign regulations, but found, based on the studies before it, that such a narrow approach would not suffice to address such ills as reduced property values, economic stagnation, heightened crime and change in neighborhood character. As to the efficacy of more aggressive law enforcement measures, the CPC hearings revealed that such measures are generally only partially successful in stemming the criminal activity that often surrounds adult establishments.

Contrary to plaintiff's assertions in *Stringfellow's,* the City was not obligated on this record to distinguish among different types of adult uses based on the social class of their clientele or the nature of the adult entertainment they provide. Indeed, such distinctions may well

have themselves run afoul of constitutional prohibitions (*see, id.*, at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492). Significantly, the CPC itself found that "all of the adult uses which would be covered by the proposed regulations have been shown to produce adverse secondary effects * * * . Nothing in the studies or in the public testimony justifies distinctive treatment of any adult use." To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since "[t]he validity of a statute * * * is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end" (*City of Rochester v. Gutberlett*, 211 N.Y. 309, 316, 105 N.E. 548; *see also, ILQ Invs. v. City of Rochester, supra*, at 1418).

C. Reasonable Alternative Avenues of Communication

To satisfy constitutional requirements, the City additionally must assure reasonable alternative avenues of communication (*see, Renton v. Playtime Theatres, supra*, at 53-54, 106 S.Ct. at 931-932). As this Court stated in *Islip*, there must be (1) "ample space available for adult uses after the rezoning" and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on a formula derived from *Renton v. Playtime Theatres (supra)*, the Federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses " 'in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads' " (*id.*, at 53, 106 S.Ct. at 932). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-1125 (5th Cir. 1995), *cert. denied* 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425; *Grand Brittain v. City of Amarillo*, 27 F.3d 1068, 1070 (5th Cir.1994); *see also, Matter of Town of Islip v. Caviglia, supra*, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215 [areas of a municipality set aside for adult uses need not be prime locations]). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1530-1531 (9th Cir.1993), *cert. denied* 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190; *see also, Woodall v. City of El Paso, supra; Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir.1991)).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the

general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see*, 989 F.2d, at 1531). Notably, these considerations dovetail nicely with *Islip*'s requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Plaintiffs assert, and the municipal defendants do not dispute, that the amendments' enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available. The City has asserted that the space available for adult uses constitutes over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. They further assert, based on maps prepared by City officials, that the amended zoning code leaves at least 500 potential sites for adult establishments to relocate and operate.

According to the City's submissions, the amendments will allow adult businesses to remain in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses. All of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a

subway line or a major bus route. These supported allegations by the City satisfy its initial burden of showing that the space designated for adult uses is adequate to accommodate the 177 existing adult businesses.

Plaintiffs, in challenging defendants' proof, rely heavily on an affidavit by Robert McLaughlin, a land-use planning and local government consultant who actually visited the sites the City identified as potential receptors. McLaughlin alleged that many of the sites are in truth unavailable because they currently house long-term occupants such as governmental and public utility facilities that are unlikely to yield to new tenants of any sort. Other sites, according to McLaughlin, lack the necessary infrastructure or lie on wetland property that is not suitable for commercial development. Overall, McLaughlin concluded, the City's zoning plan does not allow for adequate alternative avenues for adult expression.

The McLaughlin affidavit, however, is not sufficient to raise a triable question of fact as to the availability of enough potential receptor sites. First, the affidavit's utility is undercut by McLaughlin's reliance on several assumptions that are inconsistent with controlling legal principles. McLaughlin, for example, took the position that "industrial areas" are generally unsuitable for generic commercial uses. In *Islip*, however, this Court specifically approved a local zoning ordinance that restricted adult uses to an industrial zone (73 N.Y.2d, at 548, 555, 542 N.Y.S.2d 139, 540 N.E.2d 215; *accord, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932). Similarly, McLaughlin eliminated undeveloped land, waterfront property, warehouse areas and parking lots as unsuitable receptors, although both this Court and the

Renton Court expressly recognized such areas as potentially available relocation sites.

The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable. To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Even if the criticized sites are eliminated, the absence of any quantification in the McLaughlin affidavit makes it impossible to determine whether what remains of the 500 identified sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential zone along the far west side of Manhattan are physically or pragmatically unavailable, his affidavit does not contain the hard factual data necessary to establish that, with the elimination of these sites and with due

consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses represents a significant overestimation. Given this shortfall, the accuracy of the City's over-all calculations was not called into serious question. Similarly, the McLaughlin affidavit did not provide a basis for inferring that the result of the new zoning controls would "restrict in any significant way those wishing to [patronize adult establishments]" (*Matter of Town of Islip v. Caviglia, supra,* at 554, 542 N.Y.S.2d 139, 540 N.E.2d 215). Thus, the McLaughlin affidavit is speculative and presents no impediment to summary judgment (*see, Romano v. Stanley,* 90 N.Y.2d 444, 451-452, 661 N.Y.S.2d 589, 684 N.E.2d 19).

D. Plaintiffs' Remaining Claims

The *Amsterdam Video* and *Stringfellow's* plaintiffs argue that the amendments' enforcement will lead to an unconstitutional taking because much of the substantial investments they have made in their businesses will be lost if they are required to relocate. They further contend that the one-year amortization provision in the ordinance (Zoning Resolution §§ 52-734, 52-77) is too short to give them an opportunity to recoup their investments. These arguments are unpersuasive, however, because they fail to take into account the effect of the statutory provisions for hardship extensions. Under these provisions, a non-conforming adult establishment may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the nonconformity, that such expenditures cannot be recouped within a year

and that the requested extension is the minimum necessary to permit such recoupment (Zoning Resolution § 72-40). Having failed to seek relief under this provision, plaintiffs are not now in a position to complain that their constitutional due process rights have been violated (*see, Matter of Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372, *cert. denied* 488 U.S. 801, 109 S.Ct. 30, 102 L.Ed.2d 9; *Town of Islip v. Zalak*, 165 A.D.2d 83, 95, 566 N.Y.S.2d 306).

Equally unavailing is plaintiff's contention that the amendments are unconstitutionally vague. As a threshold matter, the *Hickerson* plaintiffs, purportedly patrons of adult establishments, lack standing to assert these claims because the amendments do not directly regulate their conduct (*see generally, Matter of Axelrod v. Sobol*, 78 N.Y.2d 112, 115, 571 N.Y.S.2d 902, 575 N.E.2d 388). With respect to the *Amsterdam Video* and *Stringfellow's* plaintiffs' vagueness claims, it should suffice to observe that the amendments' definitional provisions are sufficiently specific to provide the public with clear and reasonable notice of the type of businesses that are covered. Indeed, the Federal courts have already upheld similar zoning provisions that regulate commercial facilities devoting a "substantial portion" of their businesses to adult entertainment (*see, e.g., ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994), *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493, *supra*).

Finally, we are not persuaded by the *Stringfellow's* plaintiff's discrete argument that the ordinance's distance requirements are too vague because they do not include a statement indicating the precise standard for measurement. To the extent that this aspect of the ordinance's

provisions leaves room for confusion, the problem is procedurally remediable through administrative application and rule making. Notably, there is no indication on the present record that the City's enforcement of the distance rules will be arbitrary or uneven.

V. Conclusion

The City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in *Renton v. Playtime Theatres (supra)* or by this Court in *Matter of Town of Islip v. Caviglia (supra)*. Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

KAYE, C.J., took no part.

In each case: Order affirmed, with costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the **13th** day of July one thousand nine hundred and ninety-eight.

Amsterdam Video Inc., et al.,

Plaintiffs-Appellants,

v.

The City of New York, et al.,

Defendants-Appellees.

Dkt No: 98-7270

(Filed July 13, 1998)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Plaintiffs-Appellants Amsterdam Video Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,

Administrative Attorney

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APPENDIX E

Amortization Ordinance

72-40

AMORTIZATION OF CERTAIN ADULT ESTABLISHMENTS AND SIGNS FOR ADULT ESTABLISHMENTS

The Board of Standards and Appeals may permit any non-conforming adult establishment or any non-conforming accessory business sign for an adult establishment to continue for a limited period of time beyond that provided for in Section 52-734 (Non-conforming accessory business signs for adult establishments) or Section 52-77 (Termination of Adult Establishments), provided that:

(a) an application is made by the owner of such establishment to the Board of Standards and Appeals at least 120 days prior to the date on which such establishment or sign must terminate;

(b) the Board shall find, in connection with such establishment or sign that:

(1) the applicant had made, prior to the non-conformity, substantial financial expenditures related to the non-conformity, and,

(2) the applicant has not recovered substantially all of the financial expenditures related to the non-conformity, and,

(3) the period for which such establishment or sign may be permitted to continue is the minimum period sufficient for the applicant to recover substantially all of the financial expenditures incurred related to the non-conformity.

For the purpose of this section, "financial expenditures" shall mean the capital outlay made by the applicant to

establish the adult establishment or sign exclusive of the fair market value of the building in which such use or sign is located and exclusive of any improvements unrelated to the non-conforming adult establishment or non-conforming accessory business sign for adult establishments.